IN THE COURT OF APPEALS OF IOWA

No. 0-608 / 99-1737
Filed November 8, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY CONRAD LADEAUX,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge.

Defendant appeals from the judgment and sentence entered following his conviction of second-degree arson, as a habitual offender. *See* Iowa Code §§ 712.1, 712.3, 902.8 (1999). **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Jill Pitsenbarger, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Defendant appeals from the judgment and sentence entered following his conviction of second-degree arson, as a habitual offender. *See* Iowa Code §§ 712.1, 712.3, 902.8 (1999). Defendant contends: (1) the trial court erred by applying an incorrect standard in assessing his motion for new trial; (2) the court erred by excluding as hearsay certain inculpatory statements made against the penal interest of his alleged accomplice; (3) his trial counsel was ineffective to the extent error was not preserved on the hearsay issue; and (4) his counsel was ineffective for failing to object to the admission of "other crimes" evidence. We reverse and remand for new trial.

Background Facts and Proceedings. On June 14, 1999, Sioux City police officers responded to an automobile fire. Officer Gorter, the first officer to respond, saw a vehicle engulfed in flames as he approached. At the scene, he observed a beer bottle, paper towels, and a plastic milk jug near the vehicle, a 1988 Nissan Pulsar. The vehicle, valued at $500 to $2000, sustained extensive exterior damage, but no interior damage. Fire Marshal James McCrory, of the Sioux City Fire Department testified a flammable liquid, gasoline, poured on top of the vehicle caused the fire. He opined "at least a quarter and up to a gallon of liquid" would have been required to start the fire. McCrory smelled the odor of gasoline in a milk jug at the scene. According to McCrory, one could detect the smell of gasoline if sitting inside a car with a milk jug full of gasoline.

Officer Cunningham spoke with Donna Edwards, the owner of the vehicle, at the scene. She appeared upset and excited to the officer, and told him Larry

LaDeaux, her ex-boyfriend, was responsible for the fire. She described a blue Corsica belonging to LaDeaux's mother, and told the officer she believed LaDeaux was driving the Corsica. She told the officer there were two occupants, and the driver appeared to be a larger male. In a later deposition, however, Edwards testified she did not see LaDeaux drive up to her car or throw anything on it. She observed only "a poof of fire," and watched the car leave the scene. She testified, "I can't swear to that it was him [LaDeaux]." Edwards did not testify at trial. Portions of her pretrial deposition were read to the jury.

Officer Cunningham spoke on the phone with LaDeaux's mother, Martha, the night of the fire. While on the phone with Martha, the officer heard LaDeaux screaming and yelling in the background. The officer also heard furniture breaking in the background. According to the officer, LaDeaux "believed his family had called the police on him, and he was worried that he was going to go to jail for the night's occurrence." Officers went to LaDeaux's mother's house at approximately 11:00 p.m. that night, but did not find him there. LaDeaux was arrested inside a vacant "red tagged" building at approximately 1:30 to 2:00 a.m. on June 15.

On June 15, 1999, between approximately 8:00 and 8:30 a.m., Officer Cunningham spoke with LaDeaux. LaDeaux told the officer he was driving a blue Corsica on June 14. He explained he had been in the process of trying to get some money from Donna Edwards, his ex-girlfriend. He went to her house, and spoke with two men sitting on her front porch. One of the men identified himself as "Robert." LaDeaux gave the two men a ride to Sioux Falls. LaDeaux

and Robert dropped off the third man, and headed back to Sioux City. The men drank beer throughout the trip. During the trip, LaDeaux and Robert discussed Edwards. Robert told LaDeaux he was going to "torch" Edwards's vehicle. LaDeaux told Officer Cunningham he believed the statement was "just idle chitchat."

Robert and LaDeaux returned to Sioux City around 6:00 or 6:30 p.m., and continued to drink beer. The two men returned to Edwards's residence. LaDeaux pulled up beside Edwards's car, "on the belief Robert was going to get out of the vehicle and get something from" the car. Robert poured gasoline on Edwards's car and threw a match onto it, while LaDeaux sat in the driver's seat and watched. LaDeaux told Officer Cunningham he did not smell the odor of gasoline in his car prior to the incident, and he knew nothing about a milk jug. Robert got back in the car, and the two drove to a different part of town, where LaDeaux "rear-ended another vehicle, then fled the scene from that accident." LaDeaux told Officer Cunningham he was upset at his mother's house because "Robert had gotten him into that and that he wanted no part of it, but there was nothing he could do about it."

Officer Brasselero testified he had seen Robert near the area of LaDeaux's mother's residence the night of the incident. At the time, he did not know Robert was a suspect in the case. After the incident, officers made numerous attempts to locate Robert, all of which proved unsuccessful. Witnesses described Robert as a white male, slender build, longer blonde hair, possibly with a mustache.

The parties stipulated to the following facts: the beer bottle found at the scene did not contain gasoline, the milk jug contained gasoline, fingerprints on the beer bottle were not LaDeaux's, and the FBI computer analysis of the fingerprints produced no match.

LaDeaux testified at trial. He told jurors Robert wanted to get something out of Edwards's car, so he pulled up beside it. Robert got out and began "splashing things" on Edwards's vehicle. He "jumped in the car, and he threw a match on [Edwards's vehicle] while he was jumping in the car. Then, when he did that, he jumped in and he said 'Go, go, go.'" LaDeaux did not know Robert was going to start the fire. He did not participate. He did not know there was gasoline inside the vehicle. He did not smell gas in the car, or on Robert. He and Robert were "separated . . . on a couple occasions" during the trip to and from Sioux Falls. LaDeaux testified he got into an accident while he and Robert were arguing after the incident.

The jury found LaDeaux guilty of second-degree arson as a habitual offender, on an aiding and abetting theory, in violation of Iowa Code sections 712.1, 712.3, and 902.8. LaDeaux waived the State's responsibility of proof on the habitual offender allegation. The court sentenced LaDeaux to fifteen years in prison with a mandatory three-year minimum. LaDeaux appeals.

Motion for New Trial. We review for abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). LaDeaux argues, and the State concedes, the district court failed to use the "contrary to the weight of the evidence" standard in ruling on LaDeaux's motion for new trial. *See id.* Accordingly, we

reverse the district court's ruling on the motion for new trial. We need not remand for reconsideration of the motion, however, due to our ruling on exclusion of the evidence.

Exclusion of Evidence. The admission of hearsay evidence is prejudicial to the nonoffering party unless the contrary is shown. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). Therefore, our review of hearsay rulings is for errors at law. *State v. Tornquist*, 600 N.W.2d 301, 303 (Iowa 1999).

LaDeaux argues the court erred in excluding as hearsay testimony from LaDeaux's sister, Angeline LaDeaux, regarding Robert's inculpatory statements. In an offer of proof, she testified as follows:

> Q. At this time I just want to proceed to the questions that may be considered objectionable. Did you meet up with or at least see Larry and a guy named Robert on the night of the burning of Donna Edwards's car? A. Yes, I did.
>
> Q. Did you have a conversation with Robert Johnson? A. Yes.
>
> Q. Did Robert Johnson tell you that he torched or set Donna Edwards's car on fire? A. Yes.
>
> Q. Did he tell you Larry had nothing to do with that? A. Yes.
>
> Q. Was Larry yelling at Robert during that time period? A. That night, about an hour later. At the time I seen him Larry was talking to my mother and I was having a conversation with Robert, but about an hour later they were—had an altercation.
>
> Q. And this Robert Johnson that we are talking about, does he have blonde hair? A. Yes. It is very blonde.

LaDeaux argues Angeline's testimony should have been admitted under the statement against interest exception to the hearsay rule. Iowa R. Evid. 804(b)(3). The State contends: (1) LaDeaux failed to preserve the issue for review because he failed to show the declarant, Robert Johnson, was unavailable as a witness as required by Iowa Rule of Evidence 804(b); (2) the district court correctly ruled

against the admission of the statement based on the absence of corroborating circumstances indicating the trustworthiness of the statements; and/or (3) even if the district court erred in excluding the statements at issue, any error was harmless.

An offer of proof serves both to give the trial court a more adequate basis for its evidentiary ruling and to make a record for appellate review. *Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa App. 1994). The burden of making an offer of proof to preserve error is on the party that urges the evidence should have been admitted. *Id.*

Iowa Rule of Evidence 804(b)(3) requires (1) proof the declarant was unavailable as a witness, and (2) corroborating circumstances which clearly indicate the trustworthiness of the statement. *State v. Traywick*, 468 N.W.2d 452, 454 (Iowa 1991). We conclude trial testimony prior to LaDeaux's offer of proof clearly established Robert's unavailability as a witness. The record establishes Robert's existence and his involvement in the car fire. Officers testified they made numerous attempts to locate Robert after the incident, all of which proved unsuccessful. LaDeaux properly preserved the issue raised.

Rule 804(b)(3) requires corroborating circumstances to make the declaration admissible. *State v. DeWitt*, 597 N.W.2d 809, 812 (Iowa 1999). As the *DeWitt* court explained:

> The corroboration requirement of 804(b)(3) is a preliminary question as to the admissibility of evidence, not an ultimate determination as to the weight to be given such evidence. The district judge does not need to be completely convinced that exculpatory statements are true prior to their admission. Such a high burden was not intended by the corroboration requirement of

> 804(b)(3). The district court must find only that sufficient corroborating circumstances exist and then permit the jury to make the ultimate determination concerning the truth of the statements.

Id. (quoting *United States v. Garcia*, 986 F.2d 1135, 1141 (7th Cir. 1993) (footnote omitted)).

After careful review of this matter, we conclude sufficient corroborating circumstances existed to allow Angeline's testimony to come in during trial. Donna Edwards did not see who set her car on fire. Witness testimony established Robert's existence, and placed him at the scene of the fire with LaDeaux. Angeline's description of Robert matched that given by others. Robert made the statement on the night of the incident. LaDeaux's testimony and that of Officer Cunningham tend to support Robert's statement LaDeaux had nothing to do with the fire. The officer testified LaDeaux had been upset at his mother's house because "Robert had gotten him into that and that he wanted no part of it." We conclude the district court erred in excluding Angeline's testimony.

The State contends any error in excluding Angeline's testimony as to Robert's statements was harmless. When an alleged error is not of constitutional magnitude, the test of prejudice for harmless error purposes is whether it sufficiently appears the rights of the complaining party have been injuriously affected or the party has suffered a miscarriage of justice. *Traywick*, 468 N.W.2d at 454-55 (quoting *State v. Massey*, 275 N.W.2d 436, 439 (Iowa 1979)). The evidence against LaDeaux in this case was not overwhelming. Therefore, we conclude it was not harmless error to exclude Angeline's testimony regarding Robert's inculpatory statements. LaDeaux declared his innocence to Officer

Cunningham, and did so again on the witness stand. Certainly, the statement by the person LaDeaux accused of committing the crime without his knowledge might have helped convince the jury of his innocence. We disagree with the State's contention Robert's admission of guilt to LaDeaux's sister was cumulative and only marginally useful to the defense. The jury should have been allowed to weigh the evidence. We therefore reverse the district court on this issue and remand for a new trial.

Ineffective Assistance of Counsel. We need not address LaDeaux's ineffective assistance of counsel claims due to our ruling on the exclusion of evidence.

REVERSED AND REMANDED.